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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1417

CARL D. BARTHOLOMEW, D.C., *et al.*,

Plaintiffs-Petitioners,

—against—

VIRGINIA CHIROPRACTORS ASSOCIATION, INC., WILLIAM L. VOHRINGER, D.C., CLARENCE WRIGHT, D.C., HENRY L. DODGE, D.C., PETER GOODFIELD, D.C., JAMES S. HENDERSON, D.C., GEORGE MCCLELLAND, JR., D.C., METROPOLITAN LIFE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, THE TRAVELERS INSURANCE COMPANY,

Defendants-Respondents,

and

THE AMERICAN CHIROPRACTIC ASSOCIATION, INC.,

Defendant.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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Defendants-Respondents,

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted jointly on behalf of all respondents. Respondents concur in petitioners' statements under the headings *Opinions Below* and *Jurisdiction,* except to note that the opinion of the Court of Appeals is officially reported at 612 F.2d 812.

Questions Presented

The basic question presented by the petition for certiorari concerns the applicability of the McCarran-Ferguson antitrust exemption to "peer review"—a procedure sometimes used in the settlement of health insurance claims. Under the peer review procedures in issue here, insurance companies may submit questionable reimbursement claims to panels of chiropractors for advice on whether chiropractic fees charged to insureds are "reasonable and customary" within the meaning of the insurance contract.

In two recent opinions, *Group Life & Health Insurance Co.* v. *Royal Drug Co.,* 440 U.S. 205 (1979), and *St. Paul Fire & Marine Ins. Co.* v. *Barry,* 438 U.S. 531 (1978), this Court analyzed the McCarran-Ferguson Act in depth. Together, these opinions address every issue concerning the meaning of the McCarran-Ferguson Act which petitioners seek to raise here.

In reaching the decision below, the Court of Appeals for the Fourth Circuit was guided by these opinions, and applied them correctly to the facts of this case. Not surprisingly, the only other federal court to consider the application of the McCarran-Ferguson Act to peer review, in the aftermath of *Royal Drug* and *Barry,* reached an identical result.*

The McCarran-Ferguson Act exempts the "business of insurance" from the federal antitrust laws to the extent

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* *See Pireno* v. *New York State Chiropractic Ass'n,* 1979-2 (CCH) Trade Cases ¶ 62,758 (S.D.N.Y. 1979) discussed at pages 10-12, *infra.*

In *Pireno,* an appeal (No. 79-7307) was docketed on April 27, 1979. No briefs have yet been filed in the Court of Appeals and the parties to that action have now stipulated that "the appeal may be withdrawn subject to reinstatement" should this Court decide to review the Fourth Circuit opinion here.

regulated by state law, except in cases of "boycott, coercion, or intimidation." Petitioners raise no question concerning the sufficiency of state regulation; their argument is that the McCarran-Ferguson Act should not apply because the peer review procedures here are outside the business of insurance, and within the boycott exception to the Act.

In making this argument, petitioners do not contend that the peer review panels described in the complaint played any role outside of the claims adjustment process. Nor do they contend that different standards were applied to different practitioners. Petitioners simply contend that they have been injured by peer review because they seek to perform certain costly and controversial procedures which the peer review panels have found not to be "reasonable and customary." As a result, petitioners claim that patients who receive these treatments are not fully reimbursed by their insurers and may, therefore, seek less costly treatment elsewhere. In the context of these allegations, the petition raises these questions.

1. Are peer review procedures used by insurers in interpreting their obligation to reimburse policyholders for "reasonable and customary" charges within the "business of insurance"?

2. Where peer review panels apply identical standards to all chiropractic claims submitted to them, does the application of these standards to claims submitted by petitioners' patients amount to "boycott, coercion, or intimidation" simply because petitioners wish to exact higher fees by performing services which are found to be outside the "reasonable and customary" charges covered by the insurers' health care contracts?

Petitioners also raise two questions concerning the composition of the Fourth Circuit panel:

3. Does the statute which prohibits a judge from "hear-[ing] or determin[ing] an appeal from the decision of a case or issue tried by him" (28 U.S.C. § 47), preclude a district court judge from deciding an appeal involving the meaning of a statute which that judge was called upon to construe in a separate and unrelated action while the appeal was *sub judice*?

4. Does the judicial code preclude a senior circuit judge and district court judge from sitting together on the same panel, notwithstanding the fact that each is competent to serve on the appellate court when "designated or assigned" (28 U.S.C. § 43)?

Statement of the Case

The Complaint

Petitioners are chiropractors within the geographic area served by the peer review committtee of the Virginia Chiropractors Association ("VCA"). The function of that committee, in the words of the complaint, "is to examine claims submitted . . . by insurance companies and to determine whether or not a member doctor has charged a reasonable fee with respect to that particular claim and/or whether the member doctor has over-utilized his services." (Complt. ¶ 7, 4a)*

The VCA, say petitioners, "entered into an arrangement with the defendant insurance companies . . . whereby the said peer review committee would provide to the insurance companies a review of chiropractic claims submitted to the insurance companies by its insureds for the purpose of determining and setting a fee for the services rendered. . . ." (Complt. ¶ 24, 8a) Petitioners further allege that

* Petitioners' complaint is reproduced as an appendix at the conclusion of this brief. The opinions below have already been reproduced as an appendix to the petition.

the insurance companies "routinely" submitted claims for peer review, and that reimbursements to insureds were limited to the amounts which the peer review committee deemed reasonable. (*Id.*) There is no allegation that the VCA peer review committee ever functioned outside the context of assisting insurers in the settlement of specific claims submitted to them for review.

In short, the activity attributed to the VCA respondents here is the insurance adjuster-like activity of rendering assistance to insurance companies in determining the amount to be reimbursed for chiropractic services under their insurance policies. The extent of liability under these policies, which typically limit reimbursement to "usual and customary charges for necessary health care services" (451 F. Supp. at 625, App. B at 3), cannot be determined without knowledge of the state of the art, and the actual practice of chiropractors in the community.

Petitioners further alleged in their complaint that adherence by the insurers to recommendations of the peer review committee caused petitioners to be "boycotted" by patients who did not wish to pay fees, from their own pockets, above the amount which their insurers were willing to reimburse. (Complt. ¶ 26(g-h), 11a)

Subsequently, petitioners amended that theory, and contended that because peer review committees allegedly recommend against reimbursement of fees in excess of 14 to 16 dollars per office visit, regardless of the services performed, petitioners have not been compensated for services which they performed beyond those which, in their opinion, are covered by the fee approved by peer review. This, petitioners assert, amounts to a partial boycott of their services.

Respondents moved to dismiss this action in the District Court on the ground that the McCarran-Ferguson Act precludes the maintenance of an antitrust action premised on the conduct alleged here. The District Court denied this motion. On appeal the Fourth Circuit reversed, holding that the antitrust exemption does encompass peer review procedures used in the settlement of insurance claims.

The Opinion of the Circuit Court

The Court of Appeals rejected each of petitioners' arguments on the basis of three opinions of this Court and an opinion rendered by the District Court for the Southern District of New York in a virtually indistinguishable case.

Turning first to the "business of insurance" test, the Court of Appeals relied on this Court's holding that "the essence of the business of insurance is 'the relationship between the insurance company and the policyholder.' *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969)." (612 F.2d at 817, App. A. at 10.) Applying the holding to the facts of this case, the Court of Appeals observed that the only parties to the peer review process "were the insured and the insurer" and that the only issue to be decided by peer review was the degree to which the policyholder was entitled to reimbursement under his contract of insurance. (612 F.2d at 817, App. A at 11.) Accordingly, the Court found each respondent's activity to be within the business of insurance.

Turning to this Court's opinion in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), the Court of Appeals had little difficulty discerning the line which this Court drew between conduct within and conduct outside the business of insurance. Citing the "especially clarifying discourse" on *Royal Drug* in *Pireno* v. *New York State Chiropractic Ass'n*, 1979-2 (CCH) Trade Cases ¶ 62,758 (S.D.N.Y. 1979), the Circuit Court found that the

critical factor present in *Royal Drug*, and absent here, was a direct agreement between insurers and pharmacists dictating the terms on which the pharmacist could sell drugs to Blue Shield subscribers. By contrast, here the alleged agreement related solely to the interpretation of the insurance contract, and the only service provided by each member of the peer review panel was that of a claims adjustor reviewing claims for reimbursement under contracts of insurance.

Addressing petitioners' boycott contention, the Court found nothing within the confines of petitioners' complaint amounting to the "concerted refusal to deal" held necessary to state a boycott claim in *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 536 (1978). In the words of the Court:

> "It is difficult to perceive any 'concerted refusal to deal' in the mechanisms of the ACA or VCA. Patients may still freely choose their doctor. Furthermore, the peer review system does not limit the fees of a chiropractor. Indeed, if the Committee finds a charge to be beyond the patient's insurance, the insurer pays the patient the sum recommended by VCA; the chiropractor may then seek collection from his insured patient for the amount in excess of the policyholder's coverage.
>
> "If this arrangement induces a patient to employ a chiropractor who charges according to the Committee's allowances, this is a legitimate option of the patient; it evidences no duress by the member insurers and chiropractic associations. Likewise, the insurance companies do not jointly refuse to do business with chiropractors not belonging to the association. Similarly, no compulsion of any kind requires unwilling chiropractors to surrender to the peer review process."
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> (612 F.2d at 817-18, App. A at 13.)

Reasons for Denying the Writ

I

The Circuit Court's Resolution of the Business of Insurance Issue Follows the Clear Teachings of This Court, and Is Consistent With the Only Lower Court Opinion Directly on Point.

The term "business of insurance" was defined by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1960). In the words of the opinion:

> "*Congress was concerned with the type of state regulation that centers around the contract of insurance,* the transaction which Paul v. Virginia held was not 'commerce.' *The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement*—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, *it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.* Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'" (393 U.S. at 460; emphasis supplied.)

The practice of peer review falls squarely within this definition. As the Court of Appeals recognized, insurance contracts generally "limit reimbursement to usual and customary charges for necessary health care services," and the VCA peer review committee acts upon the request of the insurer to determine if claims submitted by insureds exceed

a reasonable, usual and customary charge for the services in question. (612 F.2d at 814; App. A at 4.) Peer review is thus nothing more than a method employed by insurers, with the assistance of expert advice furnished by service providers such as the VCA respondents, of interpreting the coverage provisions of insurance policies in order to determine the extent to which particular charges and services are covered by the policy. Nothing could more directly effect the relationship between the insurance company and the policyholder than this determination of the extent of coverage of the contract of insurance.

In *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), this Court, like the Fourth Circuit, took the above quoted language from *SEC* v. *National Securities* as a starting point for its analysis of whether the conduct in issue fell within the business of insurance. (440 U.S. at 215-16.) That opinion leaves no doubt that "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement" remain the "core of the business of insurance." (*Id.*)

In *Royal Drug,* independent pharmacy owners brought an antitrust action challenging a prepaid prescription drug plan under which Blue Shield entered into contractual agreements—termed "Pharmacy Agreements"—obligating participating pharmacies to provide drugs to Blue Shield policyholders at a fixed rate.

These agreements were held to be outside the business of insurance for the reason that they were "wholly separate" from any insurance contract between Blue Shield and its policyholders. (440 U.S. at 416 n.14.) As this Court observed, "policyholders are basically unconcerned with [the] arrangements made between Blue Shield and participating pharmacies." (440 U.S. at 214.)

Unlike the situation in *Royal Drug*, the challenged peer review arrangements cannot be considered distinct from the insurance contracts. Indeed, they have no significance except as a device for interpreting the scope of the obligation set forth in the insurance contract. If the allegations of the complaint are credited, it is the recommendation of the peer review panels which define the extent of the insurers' obligation under their contracts of insurance, and thus apportion the burden of health care costs between insurer and insured. The provider remains free to deal with his patients on whatever terms he wishes.

The Fourth Circuit's interpretation of *Royal Drug* and *SEC* v. *National Securities* is in complete harmony with the only other decision addressing the question of whether peer review falls within the business of insurance.

In *Pireno* v. *New York State Chiropractic Ass'n*, 1979-2 (CCH) Trade Cases ¶ 62,758 (S.D.N.Y. 1979), another chiropractor-plaintiff claimed that the Union Labor Life Insurance Company ("ULL") conspired with two chiropractic associations to fix prices for chiropractic services. Like petitioners here, plaintiff claimed that this conspiracy was carried out with the aid of a peer review committee established by one of these professional associations.

Applying this Court's opinions in *Royal Drug* and *SEC* v. *National Securities*, the District Court held the committee's review of insurance claims to be within the business of insurance and, hence, within the McCarran-Ferguson antitrust exemption:

> "The legislative history of the McCarran-Ferguson Act has been canvassed at length in two recent Supreme Court decisions, *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 47 U.S.L.W. 4203 (February 27, 1979) ("Royal Drug") and *St. Paul*

Fire & Marine Insurance Co. v. *Barry*, 98 S. Ct. 2923 (1978). . . .

". . . In creating the [McCarran-Ferguson] exemption, 'Congress was concerned with the type of state regulation that centers around the contract of insurance. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance'. *SEC* v. *National Securities Inc.*, 393 U.S. 463, 460 (1969). 'The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk.' *Royal Drug, supra*, 47 U.S.L.W. at 4205. Accord, *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 73 (1959).

". . . [In *Royal Drug*] the Court reasoned that the contracts that Blue Shield entered into with providers of pharmaceutical services were unrelated to the underwriting or spreading of risk among its insureds and were merely arrangements enabling Blue Shield to purchase goods and services, and thereby fulfill its underwriting obligations, at reduced cost. . . .

"In the instant case, by contrast, ULL's insureds are intimately and directly concerned with the peer review arrangement between ULL and the NYSCA's Committee. Unlike the arrangement between Blue Shield and participating pharmacies, the peer review arrangement between ULL and the Committee serves to define the precise extent of ULL's contractual obligations to its insureds under their policies. Peer review may enable ULL to reduce its costs, but it does so through interpretation of the contractual relationship between insurer and insured. Determination of the rights of an insured under his policy is the 'core of the business of insurance.' *SEC* v. *National Securities, Inc., supra*, 393 U.S. at 460. Peer review, moreover, involves the spreading of risk, an indis-

> pensable element of the 'business of insurance.' *Royal Drug, supra,* 47 U.S.L.W. at 4206 n. 12. The defendants determine the extent to which an individual insured must bear the full cost of chiropractic services, or instead have that cost borne by the insurer (and, through higher premiums, his fellow insureds). The Committee's role in evaluating claims submitted for review is thus akin to that played by the licensed adjuster, long an important figure in the settlement of claims against insurers. . . . The Court thus concludes that ULL and the [peer review] committee are engaged in the 'business of insurance.'" (1979-2 (CCH) Trade Cases at 78,376-77.)

No district or appellate court has ever rendered a conflicting opinion with respect to the kind of claims adjustment activity at issue here. The cases relied upon by petitioners, in which activities were held to be outside the business of insurance, simply reflect differences in the facts presented.

Contrary to petitioners' assertion, there is no conflict with *Liberty Glass Company* v. *Allstate Insurance Co.,* 607 F.2d 135 (5th Cir. 1979). There, it was alleged that certain automotive glass suppliers entered into agreements with various insurers "whereby the . . . insurance companies agreed to refer and send [to the defendant suppliers] all or nearly all of the motor vehicle replacement glass business of the defendant insurance companies . . ., to the exclusion and boycott of plaintiffs." (Complaint, ¶ 19(a)) Plaintiffs further alleged that "to induce the defendant insurance companies to enter said agreement, [the defendant glass suppliers] agreed to fix the price charged to insured automobile owners . . . at a lower price . . . [than was] charged to insured automobile owners of other insurance companies, automobile dealers, body shops and trucking companies." (*Id.*) In short, *Liberty Glass* presented the same facts as this Court dealt with in *Royal Drug*:

rather than merely adopt a procedure for apportioning the cost of insured services between the insurer and the insured, defendants in *Liberty Glass* entered into agreements with service providers to determine the total price that could be imposed, and boycotted or refused to deal with service providers who refused to be bound.

The remaining cases cited by petitioners similarly fail to indicate any conflict in legal opinion. They merely show that different facts may sometimes lead to different results.*

II

The Circuit Court's Holding on the Boycott Issue Is in Complete Accord With This Court's Analysis of the Boycott Exception in the *Barry* Case.

In *St. Paul Fire & Marine Insurance Co.* v. *Barry,* 438 U.S. 531 (1978), this Court interpreted the boycott exception to the McCarran-Ferguson Act.

This Court observed in *Barry* that not "all concerted activity violative of the Sherman Act comes within § 3(b) [the boycott exception]" (438 U.S. at 555) and that, "whatever the precise reach of the terms 'boycott,' 'coercion,' and 'intimidation,' the decisions of this Court do not support

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* In addition to *Liberty Glass,* petitioners cite two district court opinions, in which the McCarran-Ferguson Act was held inapplicable to agreements limiting the prices charged for insured services. *Arizona* v. *Maricopa County Medical Society,* 1979-1 (CCH) Trade Cases ¶ 62,694 (D. Ariz. 1979), *aff'd* (CCH) Trade Cases ¶ 63,239 (9th Cir. 1980); *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross,* 479 F. Supp. 1012 (W.D. Mo. 1979). Neither involved peer review. In the *Arizona* case, the McCarran-Ferguson exemption was forfeited when physicians agreed in advance of performing services to be bound by a fee schedule devised by a local medical association. *National Gerimedical* involved provider contracts indistinguishable from those in *Royal Drug.*

the . . . suggestion that they are coextensive with the prohibitions of the Sherman Act." (438 U.S. at 545 n.18.)

The opinion went on to note that the terminology of the boycott exception derives from a "body of decisions interpreting the Sherman Act" and that "Congress intended this language to be read in light of that tradition." (438 U.S. at 541.) Of importance to this case, this Court observed that it was cited to no decision in which "price fixing, in the absence of any additional enforcement activity, has been treated as 'boycott' or 'coercion'." (438 U.S. at 545 n.18.)

The decision of the Court of Appeals presents a straightforward application of this Court's decision in *Barry,* for petitioners here allege what is at most a maximum price fixing conspiracy, devoid of any enforcement activity of the type consistently found in the boycott decisions of this and other federal courts. Thus, as the Court of Appeals noted, the complaint contains no allegation that respondents have refused to insure patients of the petitioners; refused to honor their claims for reimbursement; or subjected their claims to standards or procedures less favorable than those applied to other chiropractors.

To the contrary, petitioners' complaint is that defendants have fixed a flat maximum reimbursement rate which the insurers adhere to without regard to who performed the service or to the specific treatments which were applied.

Even without benefit of the *Barry* decision, petitioners' inability to invoke the boycott exception would be clear. For the Fourth Circuit opinion is well grounded on other precedent as well.

Thus, in *Proctor* v. *State Farm Mut. Auto. Ins. Co.,* 561 F.2d 262 (D.C. Cir. 1977), *vacated on other grounds,* 440 U.S. 942 (1978), the Court of Appeals for the District of Columbia rejected a claim that an agreement among auto-

mobile insurers and others to limit reimbursements for automobile repairs made out a case of "boycott, coercion or intimidation." There, the Court stated that

> "[the] contention that the insurance companies entered into a horizontal agreement to pay or reimburse insureds according to a common formula based on the prevailing labor rate would not, as such, state a claim under the boycott provision, even though such an agreement could perhaps be characterized as a collective refusal to deal except at the prevailing rate. . . . To be sure, even without the threat of a complete boycott of those shops which charge more than the prevailing rate, repair shops would be under economic pressure to accede to the terms of the horizontal agreement and thereby achieve favored status. But *so long as policyholders are not prevented from utilizing non-preferred shops, the degree of coercive enforcement activity required to convert mere co-operation or concert of action into 'boycott, coercion, or intimidation' is not present. . . .*"
>
> (561 F.2d at 274-75; emphasis supplied.)*

A review of the opinions of this Court holding complaints to allege a boycott under the Sherman Act further demonstrates that the prerequisite for finding a boycott is the presence of a well defined type of coercive activity not present in this case—activity consisting of a concerted refusal to deal on any terms, or a concerted refusal to deal

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* The decision in *Proctor* was vacated for further consideration, in light of *Royal Drug,* of whether the conduct alleged fell within the "business of insurance". There, a conflict with *Royal Drug* may have been perceived for the reason that the complaint, in addition to alleging price agreements restricting the amount of insurance reimbursements, also alleged " 'vertical arrangements' with 'captive' or 'preferred' repair shops who, under economic pressure, committed themselves to do repairs for insureds at the prevailing labor rate." (561 F.2d at 265.) These vertical agreements, as in *Royal Drug,* fixed the total price which service providers could charge defendants' policyholders.

except on terms less favorable than those available to others. *See, e.g., United States* v. *General Motors Corporation,* 384 U.S. 127 (1966); *Fashion Originators' Guild of America* v. *FTC,* 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers Ass'n* v. *United States,* 234 U.S. 600 (1914).

The type of conduct found in these cases is found as well in every boycott case cited by petitioners.

Thus, in *Klors* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), the allegation was that suppliers either refused to sell merchandise to plaintiff or sold only at prices less favorable than those applied to plaintiff's competitors—not that plaintiff was denied more favorable terms which would have enabled it to offer more costly services at competitive prices.

Similarly, in *Ballard* v. *Blue Shield of Southern West Virginia,* 543 F.2d 1075 (4th Cir. 1976), the claim was that *medical doctors* induced insurance companies to refuse payment for any services rendered by chiropractors, even though the same services would be covered if rendered by doctors. The alleged conspirators named in the *Ballard* complaint were prepaid medical plans and members of the medical profession who allegedly sought to induce discrimination against chiropractors as a class in order to exclude them from competition.

Although petitioners try to bring themselves within *Ballard* by claiming that the conspiracy in this case has prevented them from receiving compensation for certain services while "similar services rendered by medical doctors and hospitals are routinely paid" (Pet. at 22.), this allegation is not found in the complaint. Moreover, it is inconsistent with the thrust of the complaint, which alleges that other chiropractors—not doctors or hospitals—are the architects of the alleged conspiracy. Petitioners could

hardly claim that chiropractors conspired to put themselves at a disadvantage with respect to doctors and hospitals.*

Finally, *California League of Independent Insurance Producers* v. *Aetna Casualty and Surety Co.,* 179 F. Supp. 65 (N.D. Cal. 1959), did not hold that the boycott exception applied to mere allegations of price-fixing, but only that it could apply to "the methods used to effectuate the refusal to deal except at the agreed price." (179 F. Supp. at 66.) Turning to those "methods," the Court cited an alleged campaign by insurance company defendants to "induce other insurance companies to refrain from doing business with" certain independent insurance agents until those agents agreed to operate at an approved commission rate.

In short, there is a wealth of authority illuminating the meaning of the boycott exception—all of it supportive of the Circuit Court opinion which petitioners seek to have reviewed. This Court's decision in *Barry,* and its decisions in prior boycott cases, make clear that a boycott requires something more than simple adherence to an agreed upon maximum price. That, however, is all that is alleged here. What petitioners describe as the "coercive" and "intimidating" effects of respondents' alleged boycott, is simply the economic incentive to lower prices which flows whenever competitors offer similar services at lower cost.

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* Also without basis in the complaint is the allegation that patients are coerced "by the threat of non-payment to employ a chiropractor" other than petitioners (Pet. at 17). There is no allegation that any such threat was ever made against any policyholder.

III

The Fourth Circuit Panel Was Composed Entirely of Judges Qualified to Serve.

Petitioners' attacks on the composition of the Fourth Circuit panel, and on District Judge Warriner's participation in the appeal, are unsupported by any statute or any judicial opinion. Nor do they have any logical basis.

The judicial code explicitly provides that each court of appeals shall consist of "the circuit judges of the circuit in regular active service" *and* "the circuit justice and justices or judges designated or assigned." (28 U.S.C. § 43(b).) Petitioners concede, as they must, that a district court judge may ordinarily be designated to serve on an appellate panel. Yet they argue that such a designation violates their rights when the panel also includes a senior circuit judge.

This distinction cannot be maintained. By statute, a circuit judge may "retire from regular service" and yet "retain his office." (28 U.S.C. § 371.) Courts have recognized that judges who choose to retire from active service remain a valuable asset of the judicial system and that, when such judges choose to serve, they do so with the full authority that they possessed prior to their change in status. *Booth* v. *United States,* 291 U.S. 339 (1934); *United States* v. *Teresi,* 484 F.2d 894, 898 (7th Cir. 1973); *United States* v. *Moore,* 101 F.2d 56 (2d Cir.), *cert. denied,* 306 U.S. 664 (1939); *Maxwell* v. *United States,* 3 F.2d 906 (4th Cir.), *aff'd* 271 U.S. 647 (1925). There is no reason in this day of unprecedented appellate case loads to adopt a different rule which would preclude the appellate courts from fully utilizing the manpower available to them.

Petitioners' arguments with respect to the disqualification of Judge Warriner are equally without basis. Petitioners

rely on 28 U.S.C. § 47, which prohibits a judge from "hear[ing] or determin[ing] an appeal from the decision of a case or issue tried by him." The district court case which Judge Warriner decided, *Virginia Academy of Clinical Psychologists* v. *Blue Shield,* 469 F. Supp. 552 (E.D. Va. 1979), did not involve any party to this action, and did not involve peer review. In short *Virginia Academy* was a different case with a different issue.* The only common element is that both cases called for a construction of McCarran-Ferguson Act.

If petitioners' argument is accepted here, then any district court judge would be precluded from participating in any appeal which may involve statutes construed by that judge in other cases in the district court. No statute or policy requires a rule which would so undermine the ability of district court judges to serve by designation in the appellate courts.

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* As noted previously, Judge Warriner had not even decided *Virginia Academy* at the time the appeal was heard in this action.

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

April 13, 1980

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

Civil Action No. 77-0062

CARL D. BARTHOLOMEW, D.C., J. MICHAEL BECKER, D.C., GEORGE DAUWEL, D.C., JOHN G. LESTER, D.C., JACK S. MASK, D.C.,

Plaintiffs,

vs.

VIRGINIA CHIROPRACTORS ASSOCIATION, INC., THE AMERICAN CHIROPRACTIC ASSOCIATION, WILLIAM L. VOHRINGER, D.C., CLARENCE WRIGHT, D.C., HENRY H. DODGE, D.C., PETER GOODFIELD, D.C., JAMES S. HENDERSON, D.C., GEORGE MCCLELLAND, JR., D.C., METROPOLITAN LIFE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, THE TRAVELERS INSURANCE COMPANY,

Defendants.

COMPLAINT

Plaintiffs, by their attorney, bring this action against the defendants for damages and injunctive relief for violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, 15 U.S.C. Section 1 and Section 2, as amended and supplemented, commonly known as the Sherman Act, and under Sections 4 and 16 of the Act of Congress of October 15, 1911, 15 U.S.C. Sections 15 and 26, as amended and supplemented, commonly known as the Clayton Act, and allege as follows:

1. The purpose of this action is to recover damages against the defendants for injuring the individual plaintiffs,

which injuries proximately resulted from the defendants violations of the Anti-Trust Laws of the United States; to recover damages for violations of the Common Law and the Laws of the State of Virginia; which actions are ancillary to and connected with the violations of the Anti-Trust Laws of the United States; and to restrain and enjoin the defendants from continuing the illegal combinations, conspiracies and contracts in restraint of trade and commerce to the irreparable harm and injury of the Plaintiffs.

2. Plaintiff, Carl D. Bartholomew, D.C., an individual, is and since 1972 continuously has been engaged in the delivery of health care services to the general public through practice of the profession of chiropractic as a duly licensed and qualified Doctor of Chiropractic, under the laws of the State of West Virginia, with professional offices for the visitation and health care treatment of patients at 207 South Street, Bluefield, West Virginia. From December, 1976, Dr. Bartholomew has been, and still is, a duly licensed and qualified Doctor of Chiropractic under the laws of the State of Virginia, with professional offices for the visitation and health care treatment of patients at 4502 Starkey Road, S.W., Suite 4-A, Roanoke, Virginia.

3. Plaintiff, J. Michael Becker, D.C., an individual, is and since March, 1970, continuously has been engaged in the delivery of health care services to the general public through practice of the profession of chiropractic as a duly licensed and qualified Doctor of Chiropractic under the laws of the State of Virginia, with professional offices for the visitation and health care treatment of patients presently at 5346 Peters Creek Road, Roanoke, Virginia.

4. Plaintiff, George Dauwel, D.C., an individual, is and since January, 1973, continuously has been engaged in the

delivery of health care services to the general public through practice of the profession of chiropractic as a duly licensed and qualified Doctor of Chiropractic under the laws of the State of West Virginia, with professional offices for the visitation and health care treatment of patients from Virginia and West Virginia, at 19 W. Main Street, White Sulphur Springs, West Virginia.

5. Plaintiff, John G. Lester, D.C., an individual, is and since September, 1954, continuously has been engaged in the delivery of health care services to the general public through practice of the profession of chiropractic as a duly licensed and qualified Doctor of Chiropractic under the laws of the State of Virginia and Florida, with professional offices for the visitation and health care treatment of patients presently at 130 W. Calhoun Street, Salem, Virginia.

6. Plaintiff, Jack S. Mask, D.C., an individual, is and since November, 1969, continuously has been engaged in the delivery of health care services to the general public through practice of the profession of chiropractic as a duly licensed and qualified Doctor of Chiropractic under the laws of the State of Virginia, with professional offices for the visitation and health care treatment of patients presently at 639 N. Coulter Street, Staunton, Virginia.

DEFENDANTS

7. The Virginia Chiropractors Association, Inc. is a Virginia Corporation transacting business in the Western District of Virginia. The Virginia Chiropractors Association, Inc. nominates candidates for the chiropractic member of the Virginia State Board of Medicine; the chiropractic member of the Virginia State Board of Medicine

prepares the questions for the certification examination on practice and therapeutics for Part II of the examination; the chiropractic member of the Board of Medicine also grades these parts of the examination; the purpose of the examination is to either allow or disallow chiropractors from practicing within the State of Virginia; therefore, the Virginia Chiropractors Association, Inc. has had at least indirect control over selection of practitioners of chiropractic within the State of Virginia. The Virginia Chiropractors Association, Inc. has a subdivision called the Peer Review Committee whose stated purpose is to intercede in disputes between third party payors and Doctors of Chiropractic. As a practical matter, the Peer Review Committee's function is to examine claims submitted to them by insurance companies and to determine whether or not a member doctor has charged a reasonable fee with respect to that particular claim and/or whether the member doctor has over-utilized his services. The Peer Review Committee is comprised of Doctors of Chiropractic who reside and practice in the State of Virginia and who compete with other Doctors of Chiropractic within and without the boundaries of the State of Virginia.

8. The defendant, The American Chiropractic Association is a voluntary association which does business and has members and agents who reside in the Western District of Virginia. The American Chiropractic Association also has an Insurance and Peer Review Committee and the individual claims and disputes decided by the Peer Review Committee of The Virginia Chiropractors Association, Inc. may be appealed to that body. The American Chiropractic Association has issued guidelines for Peer Review which have purportedly been adopted by the Virginia Chiropractors Association, Inc.

9. The defendants, Clarence Wright, D.C., Henry H. Dodge, D.C., Peter Goodfield, D.C., James S. Henderson, D.C., and George McClelland, Jr., D.C., are all members of either the 1973, 1974, 1975 and/or 1976 Virginia Chiropractors Association, Inc.'s Peer Review Committee and are individual members of that Committee who have rendered decisions on individual claims submitted to them for the past four years. These members of the Peer Review Committee were appointed by the President of the Virginia Chiropractors Association, Inc.

10. The defendant, William L. Vohringer, D.C. is the President of Virginia Chiropractors Association, Inc. and exercises the responsibility of appointing members to the Peer Review Committee.

11. The defendants, Metropolitan Life Insurance Company, The Aetna Casualty and Surety Company and The Travelers Insurance Company are licensed insurance companies, foreign to the State of Virginia, but who are authorized to do business in the State of Virginia, and who provide amongst other things, insurance coverage to individuals and members of groups for medical and chiropractic costs and expenses (commonly known as "health insurance").

CO-CONSPIRATORS

12. The members of the American Chiropractic Association's Insurance and Peer Review Committee who engage in the practices described herein are not named as defendants in this action, but are named as Co-conspirators, and all of these members participated as co-conspirators in the offenses alleged herein and have performed acts and made statements in furtherance thereof; all insurance companies which have submitted claims to be reviewed by the Insur-

ance and Peer Review Committee of the Virginia Chiropractors Association, Inc., which are not named as defendants herein, are named as co-conspirators, and all of these insurance companies participated as co-conspirators in the offenses alleged herein and have performed acts and made statements in furtherance thereof.

TRADE AND COMMERCE

13. The great majority of insurance companies described as defendants and co-conspirators herein are corporations foreign to the State of Virginia, who engage in interstate commerce. The interaction of the Virginia Chiropractors Association, Inc.'s Peer Review Committee and these insurance companies affects the interstate transactions which occur between these insurance companies and the Plaintiff's in this cause of action and the patients of the named Plaintiffs.

14. The memberships of Virginia Chiropractors Association, Inc. and The American Chiropractic Association consist of Chiropractors located in the State of Virginia and throughout the United States. Those Chiropractors and Plaintiffs provide health care services to individuals located in the State of Virginia and throughout the United States. Those members furnish chiropractic services to persons residing in the states in which such members practice and in other states, so that in many instances, individuals obtaining treatment and services from such members are caused to come from one of the several states to another.

15. Plaintiff, J. Michael Becker, routinely provides health care services for patients residing in the State of West Virginia.

16. Plaintiff, John G. Lester, routinely provides health care services for patients residing in the State of West Virginia.

17. Plaintiff, George Dauwel, routinely provides health care services for patients residing in the State of Virginia.

18. The defendants, The Aetna Casualty and Surety Company, Metropolitan Life Insurance Company and The Travelers Insurance Company are engaged in the business of *inter alia* providing insurance coverage for health care, by the sale of insurance policies to individuals and groups within the various states of the United States. This service facilitates, directs and has an effect upon the conduct of interstate business and contributes directly to the flow of persons, money and services in interstate commerce.

19. The activities of defendants and co-conspirators described herein retard Plaintiff practitioners' ability to procure innovative and modern equipment and facilities resulting in a loss of interstate transportation of chiropractic equipment.

20. Activities of defendants and co-conspirators discourage the entry of Chiropractors into the State of Virginia, resulting in a further loss of interstate transportation of chiropractic equipment and interstate movement of chiropractic patients as well as interstate migration of Chiropractors.

21. The activities of the associations, companies and the individual defendants, named as defendants herein, and the actions and activities of all co-conspirators named herein are within the flow of interstate commerce and have substantial effect upon that commerce.

OFFENSE

22. For several years up to and including the date of filing of this Complaint, the defendants and co-conspirators have been continuously engaged, among themselves and between each of them, in an unlawful combination and conspiracy to boycott, intimidate and coerce the Plaintiffs in a concerted effort to monopolize the practice of chiropractic placing an unreasonable restraint on the aforesaid interstate trade and commerce by combining and conspiring to *inter alia* fix prices in the chiropractic profession in violation of Section 1 of the Sherman Act. Said unlawful combination and conspiracy is continuing and will continue unless the relief herein after prayed for is granted.

23. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action between the defendants themselves and between the defendants and co-conspirators to fix and maintain the fees for chiropractic services performed by members of the defendant associations as well as non-member chiropractic practitioners including Plaintiffs herein.

24. The aforesaid combination and conspiracy to boycott, intimidate and coerce Plaintiffs and others, has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are: (a) Since in or about April, 1973, defendant, Virginia Chiropractors Association, Inc., through its Peer Review Committee, entered into an arrangement with the defendant insurance companies and co-conspirator insurance companies, whereby the said Peer Review Committee would provide to the insurance companies a review of chiropractic claims submitted to the insurance companies by its insureds for the purpose of

determining and setting a fee for the services rendered by independent, licensed, qualified Doctors of Chiropractic, including, but not limited to the Plaintiffs herein; (b) From, in or about April, 1973, and continuing through the present date, the said defendants proceeded to engage in a conspiracy whereby claims for insurance proceeds under health policies for Plaintiffs chiropractic services, were routinely submitted to the said Peer Review Committee for evaluation. Such evaluation included setting and establishing a fee for the services rendered by the Plaintiffs to the insured whereby defendant insurance companies limited their payment under their policies of insurance, to the said fixed fee; (c) With the exception of the first hearing date of the Virginia Chiropractors Association, Inc.'s Peer Review Committee, hearings were held and fee determinations made without notice given to the treating Plaintiff chiropractor and without benefit of the treating chiropractors x-rays, records, examination results or comments; (d) Defendant, Virginia Chiropractors Association, Inc. purported to follow Peer Review guidelines promulgated by The American Chiropractic Association; (e) The American Chiropractic Association held itself out as an appellate body for decisions of Virginia Chiropractors Association, Inc. Peer Review Committee and did in fact review certain determinations of Virginia Chiropractors Association, Inc.; (f) The evaluations so made by defendants, Virginia Chiropractors Association, Inc. and The American Chiropractic Association were uniformly forwarded to the insureds all or most of whom in Virginia, by information and belief, were or are patients of the Plaintiffs; (g) Defendant and co-conspirator insurance companies, on information and belief, routinely relied on and adopted the evaluation of the Peer Review Committee to base payment for claims for Plaintiffs' services.

25. In effectuating the aforesaid combinations and conspiracies the defendants and co-conspirators have done things which, as herein before alleged, they agreed and conspired to do, including, among other things, the following:

(a) The defendant chiropractic associations and the members of their Peer Review Committees, all of whom compete with other chiropractors within and/or without the State of Virginia have combined with insurance companies, above described as defendants and co-conspirators to fix prices in the chiropractic profession, and, especially, to fix a price ceiling for all chiropractic services rendered in the State of Virginia and elsewhere; and their conspiracy has crippled the freedom of other chiropractors in their trade and restrained their abilities to render their services in accordance with their own judgment.

EFFECTS

26. The aforesaid combination and conspiracy has had the following effects, among others, on the individual Plaintiffs and the practice of chiropractic within the State of Virginia, to-wit:

(a) The patients of Plaintiffs have paid fees to chiropractors for services rendered and they have been unable to obtain reimbursement for those charges from their health insurance carriers, because of the Virginia Peer Review Committee's almost automatic reduction recommendations made to the insurance carriers who submitted claims for the consideration of the Peer Review Committee.

(b) Because of the actions of the defendants, the Plaintiff chiropractors, named herein, have been restrained from charging fees commensurate with their abilities, quality of services and quality of facilities and equipment for all of their patients.

(c) Purchasers of chiropractic services from the Plaintiffs have been deprived of the benefits of free and open competition in the acquisition of such services.

(d) All of the above has resulted in an anti-competitive atmosphere in the chiropractic community, and retarded the improvement of services rendered.

(e) As a direct result of the acts of the defendants and co-conspirators described herein, the individual Plaintiffs, have suffered and continue to suffer injury to their business and injuries in their contractual relations with their patients.

(f) All of the above has discouraged the entrance of chiropractic practitioners into the State of Virginia and has encouraged practitioners already within the State who are at variance ideologically and professionally from defendants to leave the State of Virginia.

(g) Employees having group health insurance plans have boycotted Plaintiff practitioners as a result of insurance companies non-payment of employees claims for services performed by Plaintiff chiropractors.

(h) Upon information and belief, the aforesaid combination and conspiracy was intended to, and it does in fact, coerce and intimidate Plaintiffs and others to comply with the fee schedule established by the Virginia Chiropractors Association, Inc.'s Peer Review Committee, and published through Peer Review opinions,

or to face being boycotted by prospective and past patients whose insurance companies adopt the Peer Review Committee fee schedule and will not pay the same percentage of Plaintiffs' fees as would be paid if the patient visited a practitioner other than the Plaintiffs herein.

(i) Upon information and belief, the aforesaid combination and conspiracy was intended to, and it does in fact, coerce and intimidate Plaintiffs and others to comply with the fee schedule established by the Virginia Chiropractors Association, Inc.'s Peer Review Committee, and published through Peer Review opinions, or to face having their patients being informed that they over-charge or over-utilize treatment, causing irreparable damage to Plaintiffs' reputations and professional standing.

ANCILLARY STATE CLAIMS

27. The individual defendants, named herein, namely, Clarence Wright, D.C., Henry H. Dodge, D.C., Peter Goodfield, D.C., James S. Henderson, D.C. and George McClelland, Jr., D.C., by engaging in the above mentioned activities in their capacities as members of the Virginia Chiropractors Association, Inc.'s Peer Review Committee, have advised insurance companies and patients of individual chiropractors, especially those Plaintiff chiropractors named herein, that the Plaintiff chiropractors have committed fraud, in that they have given and rendered unnecessary services to their patients and charged their patients excessively therefore.

28. The members of the Peer Review Committee have made these statements, both oral and written, to the pa-

tients of the Plaintiff chiropractors and to certain insurance companies without making a reasonable effort to obtain the facts surrounding the therapy and treatment they were investigating and without notifying the Plaintiff chiropractors or requesting their records; the individual defendants named in paragraph 27, have acted outside the scope of the functions of their Peer Review Committee in making the recommendations mentioned above; the Peer Review Committee has acted contrary to the rules of the American Chiropractic Association, which they allege to have adopted, and on information and belief, malice against the Plaintiff chiropractors has been a motivating force in the recommendations and decisions and comments made by the members of the Peer Review Committee concerning the Plaintiff chiropractors.

29. In doing the acts above described and making the statements above mentioned the individual defendants, named above, and the association to which they belong, namely, the Virginia Chiropractors Association, Inc. has libeled and slandered the individual Plaintiff chiropractors and interfered with the contractual relations between the Plaintiff Doctors of Chiropractic and their patients. The interferences with contractual relations and statements amounting to libel and slander have injured the reputations of the Plaintiffs and severely damaged their professional standing, resulting in loss of business and fees in their occupations.

DAMAGES

30. As a consequence of the unlawful acts of the defendants, as aforesaid, the individual Plaintiffs have been injured in their businesses, property and contractual relations

in the approximate amount of $3,000,000.00 as of the date of filing this Complaint.

31. Also, as a result of the Ancillary State Allegations and Claims made and presented in this Complaint, the Plaintiffs have each been damaged in the sum of $250,000.00 and each should be awarded punitive damages in addition to the above mentioned compensatory damages in the sum of $500,000.00

32. Each Plaintiff will continue to incur injury to his business and property and suffer irreparable harm for as long as the defendants persist in their unlawful conduct.

WHEREFORE, premises considered, the Plaintiffs pray:

1. That this Court adjudge and decree that the defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce resulting in the illegal fixing of prices within the chiropractic profession, all in violation of Section 1 of the Sherman Act.

2. That the defendants and all other persons acting or claiming to act on their behalf and each of their members be temporarily enjoined and restrained, during the pendency of this action, from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, plan, program or device having a similar purpose of effect.

3. That the defendants and all other persons acting or claiming to act on their behalf and each of their members be permanently enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, plan, program or device having a similar purpose or effect.

4. That the defendants, and all other persons acting or claiming to act on their behalf, and each of their members, be temporarily enjoined and restrained during the pendency of this action from advising anyone, ordering anyone or recommending that any person or entity adhere to any schedule of prices or maximum amounts which should be charged by any chiropractor for the performance of chiropractic services in the State of Virginia or elsewhere.

5. That the defendants, and all other persons acting or claiming to act on their behalf, and each of their members, be permanently enjoined and restrained from advising anyone, ordering anyone or recommending that any person or entity adhere to any schedule of prices of maximum amounts which should be charged by any chiropractor for the performance of chiropractic services in the State of Virginia or elsewhere.

6. That the defendant insurance companies be required to cancel those provisions of their insurance policies and every other rule or statement of policy which has the purpose or effect of suppressing or restricting free and open competition in the sale of chiropractic services.

7. That judgment should be entered in favor of the individual Plaintiffs against the defendants in a sum equal to treble the amount of damages suffered by the said Plaintiffs by reason of the violations of the Sherman Anti-Trust

Act, or the sum of $9,000,000.00, together with costs of this suit and reasonable attorney's fees.

8. That judgment should be entered in favor of Plaintiffs for the Ancillary Common Law and State Claims hereinbefore alleged, in the sum of $1,250,000.00 compensatory damages and $2,500,000.00 punitive damages.

9. And that the Plaintiffs have such further relief as the Court may deem to be just and proper.

/s/ C. Jacob Ladenheim
C. Jacob Ladenheim,
Attorney for Plaintiffs

VERIFICATION

I, C. Jacob Ladenheim, Attorney for Plaintiffs, state that the allegations contained in the above and foregoing Complaint are true and correct to the best of my information, knowledge and belief.

/s/ C. Jacob Ladenheim
C. Jacob Ladenheim

Subscribed and sworn to before me a Notary Public on this 7th day of April, 1977.

/s/ Doris J. Ruff
Doris J. Ruff
Notary Public